ORIGINAL

NO. 89-5809

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ROBERT SAWYER,
PETITIONER

VERSUS

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,
RESPONDENT

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
COUNSEL OF RECORD
RESEARCH & APPEALS
COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053

COUNSEL FOR RESPONDENT

REASONS FOR NOT GRANTING THE WRIT

I. The United States Fifth Circuit Court of Appeal interpreted the decision of Caldwell v. Mississippi as a "new rule" of law within the meaning of Teague v. Lane and this interpretation is supported by the decisions in the United States Court of Appeal for the Tenth Circuit and the United States Court of Appeal for the Eleventh Circuit and does not present a conflict in the Circuits such that this Court should grant the writ.

II. The Fifth Circuit's determination in Sawyer v. Butler that a Caldwell violation does not fall within either of the Teague exceptions does not promote a grant of this writ despite a different conclusion by the Tenth Circuit in Hopkinson v. Shillinger.

III. Since prosecutorial remarks do not violate the Eight Amendment if analyzed under the standards for review of such claims formulated by this Court in Donnelly-Caldwell-Darden, review is not necessary.

LIST OF PARTIES

The parties to the proceeding below were:

ROBERT H. BUTLER, SR.,
FORMER WARDEN, LOUISIANA STATE PENITENTIARY

LARRY SMITH,
APPOINTED INTERIM WARDEN, LOUISIANA STATE PENITENTIARY

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

JOHN M. MAMOULIDES,
DISTRICT ATTORNEY FOR JEFFERSON PARISH

ROBERT SAWYER,
PETITIONER

ELIZABETH W. COLE
AND
CATHERINE HANCOCK
ATTORNEYS FOR PETITIONER

TULANE UNIVERSITY LAW CLINIC

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STATEMENT OF THE CASE

I. Course Of Proceedings Below

Petitioner was convicted of first degree murder and sentenced to the penalty of death on September 19, 1980. His conviction and sentence were affirmed by the Louisiana Supreme Court. See State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence. See Sawyer v. Louisiana, 442 So.2d 1136 (La. 1983). A second application for certiorari to the United States Supreme Court was denied. See Sawyer v. Louisiana, 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). Petitioner filed an application for state habeas relief which resulted in an evidentiary hearing on July 25, 1985. After a full hearing, relief was denied with opinion by the Twenty-Fourth Judicial District Court. See Appendix A. Relief was further denied without opinion by the Louisiana Supreme Court. See Sawyer ex rel v. Maggio, 480 So.2d 313 (La. 1985). Lastly, Petitioner applied for federal habeas

relief which was denied. See Sawyer v. Blackburn, No. 86-223 slip op. (5th Cir. April 8, 1987). Petitioner was then granted a certificate of probable cause and a stay of execution and appealed to the United States Court of Appeal for the Fifth Circuit which denied his petition on June 30, 1988. See Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). A rehearing en banc was granted by the Fifth Circuit. After oral argument the parties were asked to file supplemental briefs concerning three questions in regard to the applicability of Teague v. Lane. The En Banc Court issued its opinion August 15, 1989, denying relief in a 9-5 decision.

II. Statement Of The Facts

The United States District Court, Eastern District of Louisiana, adopted the following statement of facts as set forth in the opinion of the Supreme Court of Louisiana.

> "A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.
>
> "On September 28, 1978, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.
>
> "Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.
>
> "The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten,

> scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.
>
> "After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening Ms. Shano if she interfered or ever revealed the incident.
>
> "Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or the adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.
>
> "Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.
>
> "Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

"Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

"In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." State v. Sawyer, 422 So.2d at 97, 98 (La. 1982)

REASONS FOR DENYING THE WRIT

I.

The United States Fifth Circuit Court of Appeal interpreted the decision of Caldwell v. Mississippi as a "new rule" of law within the meaning of Teague v. Lane and this interpretation is supported by the decisions in the United States Court of Appeal for the Tenth Circuit and the United States Court of Appeal for the Eleventh Circuit and does not present a conflict in the Circuits such that this Court should grant the writ.

FIFTH CIRCUIT

The Fifth Circuit En Banc determined that the rule of law issued in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), so defined is a "new rule" within the meaning of Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and that Sawyer's Caldwell argument is Teague-barred unless Caldwell fits within either of Teague's two exceptions. In reaching its decision the Fifth Circuit recognized that there was no federal jurisdiction over Sawyer's present claim until this type of error gained a constitutional footing. Additionally, Caldwell was certainly new in its conclusion that such arguments violated the Eighth Amendment. Sawyer v. Butler, No. 87-3274, slip op. at 5549 (5th Cir. August 15, 1989) (en banc). The court further concluded that Caldwell was more than a straight forward application of Donnelly to new facts but was a greatly heightened intolerance of misleading jury argument and as such, Caldwell was a "new rule" within the meaning of Teague.

The Fifth Circuit rejected Sawyer's two arguments which contended that this heightened standard for review of prosecutorial argument does not create a "new rule". The court concluded that, although the Louisiana Supreme Court condemned remarks similar to Caldwell-type prosecutorial arguments, it did so under state law and not because it regarded such arguments as Eighth Amendment violations. Furthermore, the Fifth Circuit rejected Sawyer's contention that this Circuit previously decided that Caldwell is not a "new rule" in Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 476 U.S. 1176, 106 S.Ct. 2904, 90 L.Ed.2d 990 (1986). In rejecting Sawyer's second argument, the court distinguished between the meaning of "newness" in writ abuse cases from its meaning in procedural bar cases. In conclusion, the Fifth Circuit repeated the Supreme Court dicta in Teague that a rule is new for purposes of Teague if it has not been accepted at the time the petitioner's conviction became final. Teague, 109 S.Ct., at 1070.

The Fifth Circuit repeated its conclusion in Sawyer that the Caldwell "last word" ruling is a new constitutional rule of criminal procedure under Teague in Hill v. Puckett, No. 87-4922, slip op. at 212 (5th Cir. Oct. 10, 1989). Since Hill's conviction became final on November 7, 1983, the court refused to apply Caldwell retroactively since it did not come within the stated exceptions under the Teague rule. It should be noted that Judge Henry A. Politz was one of five dissenting in the Sawyer en banc opinion, but one of the three panel majority in the Hill opinion.

TENTH CIRCUIT

The Tenth Circuit, United States Court of Appeal, arrived at the same conclusion as the Fifth Circuit in its most recent decision Hopkinson v. Shillinger, No. 86-2571, slip op. at 11 (10th Cir. Oct. 24, 1989), where it determined that "consistent with our opinion in Dutton v. Brown, the rule in Caldwell falls within the 'new rule' proscription of Teague, and, therefore, cannot be applied in this proceeding unless it falls within one of the two exceptions permitted by Teague." Hopkinson v. Shillinger, slip opinion, p. 11.

Prior to the Hopkinson decision, the Tenth Circuit in Dutton v. Brown, 812 F.2d 593 (10th Cir.) (en banc), cert. denied, 108 S.Ct. 116 (1987), determined that Caldwell articulated a Supreme Court decision regarding a constitutional principle that had not been recognized previously. The court further ruled in Dutton that the failure of counsel to raise a constitutional issue reasonable unknown to him satisfied the "cause requirement". In Hopkinson, the court

reasoned that the Eighth Amendment jurisprudence of the Supreme Court prior to Caldwell did not visibly compel the outcome in Caldwell. It noted that California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) and Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1984) inclined in the opposite direction and had to be specifically addressed and distinguished in Caldwell. Furthermore, the court repeated the Caldwell majority's justification for its holding that the Eighth Amendment's heightened "need for reliability and the determination that death is the appropriate punishment in a specific case" as a basis to maintain its decision.

Moreover, the Tenth Circuit also rejected the contention that a state court proscription of conduct similar to that involved in Caldwell would establish a claim available under the United States Constitution.

ELEVENTH CIRCUIT

The Eleventh Circuit arrived at the same conclusion regarding a Caldwell claim in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on denial of rehearing, 816 F.2d 1493 (1987). In Adams, the court held that respondent's Caldwell claim was so novel at the time of his trial in October, 1978, and his sentencing and appeal in early 1979, that its legal basis was not reasonably available at that time. It further ruled that based on the novelty of the issue, respondent had established caused for his procedural default. Subsequently, the Eleventh Circuit's opinion was reviewed by the United States Supreme Court in Dugger v. Adams, 489 U.S. ____, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), where this Court specifically stated "we believe that the Eleventh Circuit failed to give sufficient weight to a critical fact that leads us to conclude, without passing on the court of appeal's historical analysis, that Caldwell does not provide cause for respondent's procedural default." Dugger, supra, at 1215. The Eleventh Circuit further repeated its conclusion that Caldwell represented a significant change in the law in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Clearly, the Eleventh Circuit maintains that a Caldwell issue is a novel claim which would qualify as a "new rule" under Teague and this Court refused to pass on the Eleventh Circuit's analysis in Dugger.

Since three Circuits, the Fifth, Tenth and Eleventh, have resolved the issue of whether a Caldwell claim is a "new rule" of law under Teague, it is not necessary that this Court review that conclusion since there is no conflict among the circuits at this time.

II.

The Fifth Circuit's determination in Sawyer v. Butler that a Caldwell violation does not fall within either of the Teague exceptions does not promote a grant of this writ despite a different conclusion by the Tenth Circuit in Hopkinson v. Shillinger.

Teague, 109 S.Ct. at 1078, held that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions articulated:

1. A rule forbidding criminal punishment of certain primary conduct and a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. Penry v. Lynaugh, 109 S.Ct. at 2952.

2. Rules which require the observance of procedures that are "implicit in the concept of ordered liberty". Teague v. Lane, 109 S.Ct. at 1075, quoting Mackey v. United States, 401 U.S. at 693 (separate opinion of Harlan, J.) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). See Yates v. Aiken, 108 S.Ct. 534 (1988). The scope of the second exception is limited by the plurality opinion in Teague "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." Teague v. Lane, 109 S.Ct. at 1076-77; procedures that are bedrock procedures which are "central to an accurate determination of innocence or guilt." Id. at 1077.

The Fifth Circuit reasoned that, since Sawyer cannot contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against execution, his Caldwell claims do not qualify for the first exception under Teague. The Fifth Circuit further concluded that Sawyer's Caldwell claims did not fall within the second exception of Teague thereby procedurally barring Sawyer's relief.

In analyzing the applicability of the second exception the Fifth Circuit reformulated the exception to apply in a death case: "Rather, such a petitioner must show that the new rule insists on procedures without which the correctness of the jury's decision to punish by death rather than life imprisonment is seriously diminished." Sawyer, supra, at 5550-51. The Fifth Circuit accepted the Teague pluralities' formulation of the second proviso which expressed a new rule as a "bedrock procedural element" that would be retroactively applied under the second exception. Sawyer, supra, at 5551. The Fifth Circuit interpreted Teague to mean that it could immediately put aside rules that only enhance as distinguished from rules essential to

fundamental fairness. Following this line of reasoning, the Court pointed out that Caldwell manifestly implicated two principles that would be fundamental in the sense required by Teague's second exception:

1. Donnelly's restriction requiring that a proceeding not be "fundamentally unfair" to the defendant;

2. The more expansive regard for jury discretion suggested by McGautha trimmed back by the United States Supreme Court's later interpretations of the Eighth Amendment.

Neither of these principles were relevant to Sawyer's claim since he relies on Caldwell's modification of Donnelly in light of the ideals in McGautha. Id. at 5551. The Fifth Circuit further reasoned that if the Caldwell rule was so fundamental as to be "implicit in the concept of order liberty" then a defendant would need only to rely on Donnelly rather than Caldwell, since only those defendants whose prosecutorial argument was not so harmful as to render their sentencing trial "fundamentally unfair" needed to rely on Caldwell. Looking for additional guidance, the Fifth Circuit then turned to the Supreme Court case Dugger v. Adams where the court held that no fundamental miscarriage of justice would result if the procedural default rule were permitted to defeat Adams's Caldwell claim. Thereafter, the Fifth Circuit concluded "because of the similarities between the two doctrines, it is difficult to see why a Caldwell violation should be sufficiently fundamental to require an exception to the 'new rule' doctrine, but not so fundamental as to require an exception to the procedural default doctrine." Sawyer, supra, at 5552. After considering the facts of Adams, the Sawyer Court presumed that the disposition in Adams presupposed a judgment about the importance of a Caldwell error to a sentencing determination. Furthermore, Sawyer's Caldwell claim has neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by the second Teague exception. Thus, Sawyer was procedurally barred from addressing his claim since it did not fall within either exception.

The Tenth Circuit arrived at the opposite conclusion when it analyzed a Caldwell claim and the application of Teague's second exception in Hopkinson v. Shillinger, supra. The Tenth Circuit stated that on an abstract level, a rule in capital hearings that no reference to appellate review can be made, or cannot be made without a full description of the appellate process, or that curative instructions must follow references to appellate review do not amount to Eighth Amendment bedrock procedural elements. But the Tenth Circuit, unlike the Fifth Circuit, extended the inquiry to the particular fact situation before it and said "it strikes us as bedrock

procedure that a jury must understand that it, and not an appellate court, carries the responsibility for imposing the death penalty." Hopkinson v. Shillinger, slip opinion at 13. The Court expressed uncertainty as to the scope of Caldwell itself, but regarded the jury's understanding of its core function in a capital sentence hearing to be fundamentally related to the accuracy of a death sentence and thus concluded that a Caldwell claim falls within the second Teague exception and must be considered.

The fact that the Tenth Circuit and the Fifth Circuit disagree on the application of the second Teague exception to the Caldwell issue is a difference in analysis as opposed to a difference in results. The Fifth Circuit based its opinion that the Caldwell decision presented a "new rule" on its interpretation of Caldwell establishing a new standard of review for prosecutorial arguments at the sentencing phase of a capital trial, that is a "no effect" test. The Tenth Circuit concluded that the Caldwell issue was a "new rule" based on its historical analysis that Caldwell was a novel claim.

Under the Fifth Circuit analysis, a defendant whose conviction was final before the Caldwell decision in 1985 would be procedurally barred from using that issue unless he could show that the prosecutorial comments violated his fundamental rights under due process. Thus a claim of a constitutional violation under due process could save a defendant who would be procedurally barred under Teague. But, then, such a defendant would not need the Caldwell case since a reliance on Donnelly would suffice.

The Tenth Circuit concluded that a defendant whose conviction was final before the Caldwell decision in 1985 would not be procedurally barred from pursuing his claim because the Caldwell claim would fit under the second exception of Teague. The Tenth Circuit then would analyze the Caldwell claim under a fundamental fairness standard which included a two-step test that adopted the Mills v. Maryland "substantial possibility" standard.

In an en banc decision, Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), the Tenth Circuit established a two-step process for evaluating a Caldwell issue: (See Darden v. Wainwright, 477 U.S. 168, 184 n.15, 106 S.Ct. 2464, 2473 n.15, 91 L.Ed.2d 144 (1986).) First, the court should determine whether the challenged prosecutorial remarks are the type of statements covered by Caldwell. In other words, they must be statements that tend to shift the responsibility for the sentencing decision away from the jury. If so, the second inquiry is to evaluate the effect of such statements on the jury to determine whether the statements rendered the sentencing decision

unconstitutional." Parks v. Brown, supra, at 1549. The Tenth Circuit thereby established its standard for evaluating a Caldwell issue: if a violation exists, as "is there a substantial possibility that the prosecutor's statements, taken in context, affected the sentencing decision."

The Tenth Circuit reiterated the "substantial possibility" standard in Hopkinson v. Shillinger, slip op. at 21. After reviewing the remarks in question in the context of the entire record the court had no trouble holding that there was no substantial possibility that the comment by the prosecutor unconstitutionally affected the decision of the jury. It further concluded that the same conclusion is reached if a fundamental fairness standard is applied. Hopkinson, slip op. at 25. Thus the Tenth Circuit may allow review under the second Teague exception, but the standard of review is something less than a no-effect test which the Fifth Circuit would apply and not much different from a fundamental fairness test.

Moreover, the Eleventh Circuit, in its discussions of Caldwell issues found in Harich v. Dugger, supra, and Mann v. Dugger, supra, assumes a two-fold approach in reviewing a Caldwell claim. "First, we must determine whether the prosecutor's comments to the jury were such that they would 'minimize the jury's sense of responsibility for determining the appropriateness of death.' Caldwell, 472 U.S. at 341, 105 S.Ct. at 2646. Second, if the comments would have such effect, we must determine 'whether the trial judge in this case sufficiently corrected the impression left by the prosecutor.' McCorquodale v. Kemp, 829 F.2d 1035, 1037 (11th Cir. 1987)." Mann v. Dugger, 844 F.2d at 1456. The Eleventh Circuit has focused ultimately on the trial court's actions based on the language in Caldwell which said that "rather it stated that such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." The Eleventh Circuit has established a two-fold test which considers the trial courts action thereby rejecting a no-effect test and implementing a test that is some what less stringent than the Fifth Circuit's standard of review.

At this time, review of the opinion in Sawyer v. Butler is unnecessary since its analysis does not differ in results from those in the Tenth and Eleventh Circuits when applied to convictions final before Caldwell. Despite the language used, the outcome for similarly situated defendants would be the same. Since no grave injustice is promoted at this time, review of the Caldwell-Teague-Penry issues is unnecessary.

III.

Since prosecutorial remarks do not violate the Eight Amendment if analyzed under the standards for review of such claims formulated by this Court in Donnelly-Caldwell-Darden, review is not necessary.

A review of the analysis in Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 86 L.Ed.2d 231 (1985), and Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), reveals that the standard of review is one of fundamental fairness.

The above standard was clearly stated in Donnelly, in an opinion by then Justice Rehnquist and joined by five other justices. While reviewing two improper remarks in the closing argument of a non-capital murder case, the court in Donnelly declared that they must be viewed in the context of the overall trial. It characterized the remarks as ambiguous and but one moment in an extended trial followed by specific disapproving instructions. While upholding the conviction, the Supreme Court further stated, ". . . we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process." Donnelly, at 1872.

Prior to this final statement the Court clearly settled the standard of review for improper prosecutorial remarks:

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, at 1871.

The Court further affirmed that the standard of review on federal habeas was the narrow one of due process, and not the broad exercise of supervisory power that would be used in regard to its own trial court.

Eleven years later the Supreme Court addressed the issue of improper prosecutorial remarks in the sentencing phase of a capital case in Caldwell v. Mississippi, supra. The majority opinion in Caldwell, written by Justice Marshall and joined by four other justices, applied a due process analysis to determine whether the improper prosecutorial remarks constituted a "failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (1941); Donnelly v. DeChristoforo, 94 S.Ct. at 1871. As a basis for vacating the death penalty in Caldwell, Justice Marshall used the

standards as found in Donnelly to distinguish the remarks in Caldwell. In both cases the remarks were considered improper and, in order to determine the effect of the remarks, the trials were viewed in their entirety. In Caldwell, Justice Marshall analyzed each possible argument of the prosecutor to permit the improper remarks under the standard of review of Donnelly but found that the remarks in Caldwell violated the Eighth Amendment. Despite Justice Marshall's statement in his closing paragraph[1] regarding "no effect," it was the fundamental fairness analysis of due process that he used throughout the opinion.

Moreover, it is evident from Justice O'Connor's concurring opinion in Caldwell, that she would espouse the due process analysis of the majority. She agreed with the majority except as to the impact of California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), on a policy choice of educating a jury as to post conviction procedures.

Justice O'Connor's position regarding the standard of review is clear when she joins the opinion of Justice Powell in Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). If Caldwell left any doubt as to the standard of review for improper prosecutorial argument, Darden cleared it up. The petitioner in Darden challenged prosecutorial remarks at the guilt-innocence phase of a capital trial. The Darden opinion clearly states that when reviewing the prosecution's closing argument it is helpful to place these remarks in context. Darden, 106 S.Ct. at 2471. It further recognized that it

> "(I)s not enough that the prosecutor's remarks were undesirable or even universally condemned.' Darden v. Wainwright, 699 F.2d 1031, 1036 (CA11 1983). The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.' Id. at 642, 94 S.Ct., at 1871."

This Court in Darden then used the above standard when it determined that the comments did not deprive petitioner of a fair trial. In reaching this decision the court looked at several factors:

(1) Did it manipulate the evidence.

(2) Did it implicate other specific rights of the accused.

(3) Was it invited by defense counsel.

[1]"Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, 105 S.Ct. at 2646.

(4) Did the judge's instruction reinforce the improper remarks or countermand them.

(5) Was the weight of the evidence heavy.

(6) Was the content of the defense counsel's argument effective.

Darden v. Wainwright, 106 S.Ct. at 2472.

The criteria used in Darden were the same as that used in Donnelly and Caldwell and in the panel opinion in Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). This Court has refused to distinguish between types of crimes for analysis purposes: capital versus non-capital. There is no precedent for treating improper argument at the guilt phase differently than at the penalty phase of a capital trial. Unless this Court wishes to impose a standard of review contrary to that used by it in Donnelly-Caldwell and Darden it must review the improper prosecutorial remarks herein under the due process criteria.

Under the Darden standard the entire trial must be reviewed to consider if the comments deprived petitioner of a fair trial. The evidence at Sawyer's trial supported his participation in the brutal, gruesome, and torturous murder of Fran Arwood. The only real issue at the trial was whether his possible intoxication was sufficient to mitigate the specific intent for the crime of first degree murder. The jury found it was not and convicted Sawyer.

It must also be considered whether the prosecutor's comments manipulated or misstated the evidence in closing argument at the penalty phase. In Caldwell, the prosecutor made the following statements which allegedly minimized the jury's sense of importance:

"ASSISTANT DISTRICT ATTORNEY:

> Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its fair. I think its unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . (Emphasis added.)

"COUNSEL FOR DEFENDANT:

> Your Honor, I'm going to object to this statement. It's out of order.

"ASSISTANT DISTRICT ATTORNEY:

> Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

"THE COURT:

> Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused. (Emphasis added.)

"ASSISTANT DISTRICT ATTORNEY:

> Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its unfair and I don't mind telling them so." Caldwell, at 2637-38. (Emphasis added.)

The key features of the comments and circumstances of the reversible error in Caldwell are the unequivocal statements,[2] objection by defense counsel,[3] reinforcement by the judge,[4] the comments were not "invited" by defense counsel's arguments and not linked to a valid sentencing consideration. Likewise, the argument was inaccurate and misleading. The Caldwell court explained:

> "The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration." Caldwell, at 2643.

The argument in Caldwell urged the jurors to view their decision as only the preliminary step in determining the appropriateness of the death sentence. It created the mistaken impression that automatic appellate review of a death sentence would provide the final determination of whether the death sentence was appropriate. This mistaken impression was reinforced by the judge and not corrected by jury instructions. Therefore, it was reversible error.

The argument in the instant case and the context in which it was made does not exhibit the characteristics of the Caldwell argument. See Petitioner's Appendix, (hereafter referred to as

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[2]"...your decision is not the final decision."

"Your job is reviewable."

"...the decision you render is automatically reviewable by the Supreme Court."

[3]"Your Honor, I'm going to object to this statement, it's out of order."

[4]"I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands.

PA), pp. 43-58. It was not focused, unambiguous or strong. The Sawyer jurors were never told that they were not the final decision makers. The prosecutor's reference to the courts was made as part of a general statement that included the trial court and the people of the Parish and it was directed at the jurors to emphasize their decision as a unit. See PA-45. The reference to the courts was ambiguous at best and made no mention of review by those courts. The entire focus at this point was that the public would view the sentence of death as a jury determination and not as twelve individual juror's decisions. These comments cannot be construed to have lessened the jury's sentencing role.

The prosecutor then briefly referred to the verdict as a recommendation[5] and continued by reminding the jurors that "You wouldn't have to make the decision" but for Robert Sawyer's choices, his actions. The prosecutor's use of the word "recommendation" tracts the statute. If this word misled the jury it would have been cured by the judge's jury instructions: "It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment." PA-56.

After reviewing the crime and Sawyer's prior manslaughter conviction, the prosecutor said, "The decision is in your hands." PA-47. Then he referred "to all the judges that are going to review this case after this day...." But when the phrase is read within the context of the entire paragraph, the prosecutor again mentioned the trial court and the people of the Parish. He was reminding the jury that a verdict of death would be telling the community its opinion of the crimes and that this particular crime should be prosecuted to the fullest extent of the law. The prosecutor continued by saying, "It's all your doing," a phrase later corrected by the Fifth Circuit to read "It's all you're doing." Then he reminded the jurors to have the courage of their convictions because there will be others behind them to either agree or to say they're wrong. Such an ambiguous and unfocused statement, made in the context of urging the jurors to have the courage of their convictions, did not decrease their sense of responsibility.

After Mr. Weidner's plea for Sawyer's life, the prosecutor made a rebuttal argument which included an emphasis on the importance of the jury's role in the criminal justice system and the importance of such a decision as a sentencing verdict. When the prosecutor began to talk about

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[5]La.C.Cr.P. art. 905.6: "A sentence of death shall be imposed only upon the unanimous recommendation of the jury..."

La.C.Cr.P. art. 905.8: "The court shall sentence the defendant in accordance with the recommendation of the jury." [Emphasis added.]

Charles Lane's conviction, the defense counsel objected and it was sustained. As he continued to talk about the aggravating circumstances, the prosecutor again reminded the jurors of their importance. PA-52. He then repeated that they were making a recommendation and referred to "this Court" (the trial court) and to any other court that might review Sawyer's case. These statements are generic and should not be lifted out of the context of the entire rebuttal which emphasized the importance of the jury's role in the criminal justice system and in its decision in this case. He followed this statement with "as a jury based on all the facts and circumstances within your knowledge you recommend the imposition of the death penalty." PA-52. (Emphasis added). Ending the rebuttal with such a strong statement of the jury's role served to reinforce the importance of the jury verdict. The use of the word recommendation was a repetition of the statutory language. Any ambiguity created would have been cleared by the judge's instruction to the jury.

After reviewing the prosecutor's remarks within the entirety of his closing argument it is clear that he continually emphasized to the jurors that it was their decision to impose the death penalty and that they were vital to the criminal justice system in making this decision. Any references to other courts were generic and mentioned with "the people of the Parish and this court." The reference to review was brief and unfocused. Never was appellate review mentioned. None of the remarks and references herein were focused, unambiguous or strong; nor were they inaccurate and misleading. Each time the prosecutor made a questionable reference he coupled it with a remark which emphasized the importance of the jury.

Moreover, the defense attorney did not object to these references, as did the attorney in Caldwell, although he did object to the references to Charles Lane. The failure of defense counsel to object indicates that the overall tone of the prosecutorial argument did not diminish the responsibility of the jury for determining the appropriateness of the death sentence for Sawyer. When the argument is read in its entirety, it is clear that the prosecutor was trying to diminish any individual guilt by jurors if they imposed the death penalty, to urge them to have the courage of their convictions and to remind them that it was the decision of the jury as a whole that would impose death for Sawyer.

Furthermore, the judge in the instant case did not reinforce the prosecutorial comments as the judge did in Caldwell. The trial judge's comments remain an important factor in a Caldwell type case. See Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986), cert denied, 480 U.S.

911, 107 S.Ct. 1359 (1987), 94 L.Ed.2d 529 (1987); Darden v. Wainwright, supra; Donnelly v. DeChristoforo, supra; United States v. Robinson, 485 U.S. ___, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988).

Moreover, the judge instructed the jury:

> "Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be sentenced to death or to life imprisonment without, etc. . . . " PA-53. (Emphasis added.)

He continued:

> "It is your duty to consider the circumstances of the offense and the character and propensities of Robert Sawyer to determine which sentence should be imposed." PA-53. (Emphasis added.)

These instructions certainly emphasized the importance of the sentencing jury's role.

After discussing aggravating and mitigating circumstances, the judge read the two verdict forms and instructed the jurors as to their use. PA-53, 56. His final words to the jury clearly emphasized the importance of its role:

> "It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentence to death or the life imprisonment. Go With Mr. Miller back in the jury room." PA-56. (Emphasis added.)

The remarks complained of here are not reversible error as in Caldwell. When viewed in the entirety of the record they did not diminish the role of the jury. The judge not only did not reinforce the remarks but he did instruct the jury that sentencing was its decision and its responsibility. And, when read within the context of the entire trial with the gruesome details of the crime itself and the eyewitness testimony of Cynthia Shano, the verdict of death was not arbitrarily imposed.

CONCLUSION

Sawyer's Caldwell issue not only fails to survive under the Fifth Circuit analysis but also fails under the Tenth and Eleventh Circuits analyses. Review of the Caldwell issue, as presented by Sawyer, and its application with the Teague-Penry framework is unnecessary at this time for the aforementioned reasons and Petitioner's Writ should be denied.

Respectfully Submitted,

JOHN M. MAMOULIDES
DISTRICT ATTORNEY

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
(504) 368-1020

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been mailed to all parties by placing same in the United States mail, postage prepaid, this 21st day of November, 1989.

DOROTHY A. PENDERGAST

APPENDIX

APPENDIX

STATE OF LOUISIANA

VERSUS

ROBERT SAWYER

24TH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF JEFFERSON

NO. 79-2841, DIVISION "G"

FILED:_____, 1985

_____
DEPUTY CLERK

J U D G M E N T

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

M. JOSEPH TIEMANN, JUDGE, DIV. "G"

STATE OF LOUISIANA

VERSUS

ROBERT SAWYER

24TH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF JEFFERSON

NO. 79-2841, DIVISION "G"

FILED:_____, 1985

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DEPUTY CLERK

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim I

DENIAL OF DUE PROCESS AND EQUAL PROTECTION CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL WHO HAD BEEN ADMITTED TO THE BAR FOR LESS THAN FIVE (5) YEARS (C.Cr.P. *Article 512*)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at the bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was re-appointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years require-

ment contained in C.Cr.P. Art. 512, which states:

> *When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleas to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.*

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La. 1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore, should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure <u>effective assistance</u> of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, <u>in fact</u>, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence

is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermitting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, "*a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.*" The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La. 1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So. 2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some consitutional errors may be considered harmless if the beneficiary of the error "*prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.*" *Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributory

factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145 (La. 1942), "*while the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice.*" Id. at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, U.S. , 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be examined and weighed in order to determine if a violation of equal protection or due process exists:

(1) the nature of the individual interest affected;

(2) the extent to which it is affected;

(3) the rationality of the connection between legislative means and purpose; and

(4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, U.S. 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden*, *supra*, this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in *Strickland v. Washington*, U.S. , 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

> *(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.*

Id., at , 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland*, *supra*, "*if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,...that course should be followed.*" *Id.*, at , 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland*, *supra*, a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that "*counsel's representation fell below an objective standard of reasonableness.*" *Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) *Failure to Interview Various Potential Witnesses*

It was held in *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984), that "*complaints of uncalled witnesses are not favored in federal habeas review..., and the [defendant] must overcome a strong presumption that [counsel's] decision in not calling...a witness*

was a strategic one." *Id.*, at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland*, *supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

(2) *Failure of Counsel to Allow the Venire to be Informed of the Penalties for the lesser Included Offenses of Second Degree Murder and Manslaughter.*

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

(3) *Ineffective Representation at the Voir Dire Stage.*

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

(4) *Waiver of Closing Argument During Guilt/Innocence Phase.*

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

(5) *Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.*

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in Larsen v. *Maggio*, 736 F.2d 215 (5 Cir. 1984):

> *(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.*

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) *Failure of Counsel to Inform Defendant of his Right to Testify.*

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify.

Therefore, this claim is without merit.

(7) *Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.*

Even should this omission by counsel be considered as unreasonable or below the standard enunciated in *Strickland*, *supra*, petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland*, *supra*, holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Mattay v. Maggio*, 736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra*.

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, sould be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Satefoot v. Estelle*, U.S. , 103 S.Ct. 3383, reh. den. 104 S.Ct.

No. 79-2841

209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETNA, LOUISIANA, THIS 8th DAY OF February, 1985.

M. JOSEPH TIEMANN, JUDGE, DIV. "G"

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STATE OF LOUISIANA

VERSUS

ROBERT SAWYER

* * * * * * * * * * * * * * * * *

24TH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF JEFFERSON

NO. 79-2841, DIVISION "G"

FILED: _____, 1985

_____
DEPUTY CLERK

J U D G M E N T

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

M. JOSEPH TIEMANN, JUDGE, DIV. "G"

THE COURT:

No, I'm really trying--

MR. CREDO:

And I believe that the proper compromise to the State's position and petitioner's position is that the Court can render a written judgment today, if it desires, saying that the petition is denied, and the stay is maintained until such time as the transcript of these proceedings is filed, which will give the petitioner approximately--

THE COURT:

What I don't want to do is have to go through and cause again the Supreme Court to go that extra, they are burdened enough. I really think I'm going to let the ruling stay, and let's do that. Follow your suggestion. We'll not tamper with the stay order. We will deny the petition. That way, if they say well, I went beyond what they intended, so be it, certainly all right. But if I did not rule, and they say, "Well, we are waiting on a ruling from the trial court." Then there would be a further unduly delay. So, the ruling is that the petition is denied.

MR. CREDO:

Does the Court wish to dictate its reasons for the denial into the record?

THE COURT:

What I would like to do is--again, the reasons are similar to what was reasoned earlier in the written reasons for the denial. I am as convinced as ever, in some areas even more convinced, having heard the statements and testimony of witnesses that what we had in this case, which Mr. James Weidner of this Parish defended Mr. Robert Sawyer, that we had a mature and reasoned, and in some ways seasoned certainly beyond his physical years, for the defense of this gentleman.

Was the defense successful, of course, it was not. I mean that is obvious. We wouldn't be here today if it was successful. He would be free somewhere in Tennessee, or somewhere else.

Was it lacking? Someone once said, you know, "Even Homer nods", which means that he fell asleep one night and didn't complete a paragraph, or a sentence, or left a dangling participle. This is an imperfect world.

We had a man who is an acknowledged and accepted expert saying, "I would have done this differently, but there are exceptions in each rule."

I am as convinced as ever, as I say in some areas more convinced, maybe I did detect, shall I call it a weakness in the defense that I was not privy to, or aware of before, but on

balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example,as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The question here is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is-- "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr.

Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bath room mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission,he said "Go to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

I think the question is did he turn his back and say "See you later." He hung with it to the end. Was he successful, no. Was he correct, who knows. Everyhody has a different style, in my opinion. But these are my rambling reasons.

The man did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say "You have to have been in business at least five years."

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality.

It's my opinion, as I say, enough was here shown to say there was effective counsel. There was--all the other things that were to be

addressed have been addressed. And those are my reasons for denying the petition.

Ms. COLE:

Your Honor, we will notify the Court of our official intent to apply to the Supreme Court.

THE COURT:

Thank you all.

(Discussion off the record.)

THE COURT:

As the Court appreciates it, there's been an oral motion, rather an oral notice of appeal. The Court would like that to be filed by written notice, or motion, if you will, which, of course, is granted.

The Court feels that sixty days should be sufficient time. If it's not, certainly an extension would be entertained. And if that is the case, give sixty days for perfecting the appeal.

Ms. COLE:

Sixty days from the physical filing of the notice, or sixty days from today?

THE COURT:

Let's give--

MR. CREDO:

The court reporter has sixty days from today to file the transcript.

(End of proceedings.)

C E R T I F I C A T E

I, Faye B. Cemo, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct as taken by me in open Court at Gretna, Louisiana, on Friday, July 12, 1985, before the Honorable M. Joseph Tiemann, in the matter entitled STATE OF LOUISIANA VERSUS ROBERT SAWYER, CRIMINAL DOCKET NO. 79-2841.

This the _____ day of _____, _____.

Faye B. Cemo
Official Court Reporter
Twenty-fourth Judicial District Court
In and For the Parish of Jefferson
State of Louisiana